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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL RAMOS, Defendant and Appellant.	D059185 (Super. Ct. No. FCH800266)

APPEAL from a judgment of the Superior Court of San Bernardino County, Gerard S. Brown, Judge. Affirmed.

A jury convicted defendant of premeditated murder and, in a separate phase of the trial, rejected his claim that he was not guilty by reason of insanity. On appeal, defendant asserts the premeditated murder judgment should be reversed because (1) the trial court erred in denying his *Batson/Wheeler*[1] motion based on the prosecutor's use of peremptory challenges to excuse three Hispanic prospective jurors; (2) during closing argument the prosecutor misstated the law and improperly referred to defendant's

1 *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

decision not to testify; and (3) there is insufficient evidence of premeditation and deliberation. We find no reversible error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 10, 2008, defendant shot and killed his cousin (David Barrita) at a party in Chino. Defendant was angry because Barrita had been involved with defendant's wife. Defendant admitted to the police that he purchased a gun several days before the shooting and that he brought the gun with him to the party in case he encountered Barrita. At trial, the events prior to the shooting were described by defendant's wife and Barrita's wife. The actual shooting was described in the testimony of Barrita's wife and his cousin, as well as in defendant's recorded statements to the police.

In September 2006, about 18 months before the shooting, Barrita's wife (Maximina Lopez) found a picture of Barrita and defendant's wife (Irene Garcia) in Barrita's cell phone.[2] Barrita admitted to Lopez that he had "gone out" with Garcia. In a subsequent phone conversation, Lopez told defendant that his wife was a "loose woman" who was chasing her husband. Barrita also spoke to defendant on the phone, telling him that he never had sexual relations with Garcia and they just "used to talk." After this phone conversation, Barrita told Lopez that defendant had threatened to kill him.

During this same time period in September 2006, Garcia separated from defendant while she was pregnant with her second child. Garcia claimed defendant was the father

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[2] Defendant and Garcia had a long-term relationship and had children together; for convenience we refer to them as husband and wife even though they were never legally married.

but defendant did not accept that the child was his. Garcia left a letter for defendant in their house, stating that she was leaving him; she had deceived him even though she had not "cheated" on him but it was "just as friends"; she knew he would not understand; she made a mistake but swore she only "gave" herself to him; she requested his forgiveness for her "stupidity"; and she had forgiven his mistakes but he was the one "with the stronger temper."

In June 2007, defendant and Barrita encountered each other at a party. During this encounter defendant pulled out a knife and stated that Barrita "owed him something." Barrita responded that "he wanted to solve this issue, but just with their hands, not with weapons." After this incident, Barrita did not accompany his wife to several parties because he knew there would be a problem if he met defendant there.

The shooting occurred at about 9:45 p.m. on May 10, 2008, as Lopez, Barrita, and their young son were leaving a party held at the home of Barrita's cousin (Clemente Vasquez). Defendant was not invited to the party, but about 30 minutes before the shooting Vasquez saw defendant outside his home. Vasquez gave defendant a beer, and then returned to his guests while defendant remained outside the party area. As Barrita and his family were walking out the front gate to leave the party, defendant walked towards Barrita and said, " 'Cousin, you owe me something.' " Defendant then lifted his shirt, pulled out a gun from his waistband, and shot Barrita. Defendant first fired about two shots, and then while Barrita was lying on the ground he shot him about three more times. Defendant ran away and left in his car.

Barrita had been shot once in his face, once in his hand, and three times in his chest. He died minutes after he was shot.

After an extensive search, on May 16, 2008, the police found defendant walking outside a residence in the city of Stanton where he had fled. Defendant ran from the police but was apprehended and arrested.

During a recorded interview with the police, defendant stated that his wife left him for his cousin Barrita when she was pregnant. Later, his wife wanted to get back together, but defendant was still angry. Barrita was boasting to a lot of people that he "took [defendant's] woman[,]" which made defendant angry. Defendant did not feel well anymore; he supported his two babies, but he was not living with them and he did not know if the second child was his or Barrita's child. Barrita was "disrespecting" him and that was "why that happened."

Defendant told the police that he bought a gun five days before the incident, and "in [his] anger" he thought about looking for Barrita and "hitting" or "shooting" him.[3] On the evening of the shooting, defendant was at another party for several hours and then decided to go to Vasquez's party to see a girl he liked who lived there. He did not know Barrita was at Vasquez's party, but he brought the gun with him just in case he saw him. He went alone, explaining that he did not have friends anymore. People were giving him

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3 The police interview was conducted in Spanish, defendant's native language. During the interview a Spanish-speaking officer translated defendant's statements into English for another officer. The officer translated defendant's use of the word "pegarle" as "shoot[]" him, whereas at trial a defense certified interpreter testified that the correct translation was "hit" him.

"bad looks" and treating him "like less of a man" because he had been "cheated on" and his wife was "involved with another" man. When defendant encountered Barrita outside the party, defendant told Barrita that Barrita "owed [defendant for] the humiliation," and defendant was "going to collect." After saying this to Barrita, defendant pulled out the gun and repeatedly shot Barrita. Defendant told the police that at the time of the shooting he felt "[his] anger" and "[n]othing," but he now felt sad because Barrita was his cousin. He told the officers "[e]verything is [his] fault" and he wanted them to punish him.

Jury Verdict and Sentence

At the guilt phase of the trial, the defense conceded that defendant had committed second degree murder, but argued the evidence did not show the premeditation and deliberation necessary for first degree murder. The jury rejected this, and found defendant guilty of first degree murder, with a true finding that he personally discharged a firearm. At the sanity phase of the trial, the jury rejected his claim that he was not guilty by reason of insanity and found him sane at the time of the murder.

Defendant was sentenced to two terms of 25 years to life for the murder and the firearm enhancement.

DISCUSSION

I. *Denial of* Batson/Wheeler *Motion*

Defendant argues the trial court erred in denying his *Batson/Wheeler* motion based on the prosecutor's peremptory excusals of three Hispanic prospective jurors.[4]

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4 For convenience, we refer to the prospective jurors as jurors.

To protect a defendant's constitutional rights to equal protection and a jury drawn from a representative cross-section of the community, the prosecutor's peremptory challenges may not be based on group bias. (*People v. Lewis* (2008) 43 Cal.4th 415, 469.) "[T]he unconstitutional exclusion of even a single juror on improper grounds of . . . group bias requires . . . reversal of the judgment . . . ." (*People v. Reynoso* (2003) 31 Cal.4th 903, 927, fn. 8.) If the defendant makes a prima facie showing of a discriminatory purpose for the prosecutor's peremptory challenges, the burden shifts to the prosecutor to offer nondiscriminatory justifications for striking the jurors. (*People v. Lewis, supra*, 43 Cal.4th at p. 469.) If the prosecutor presents nondiscriminatory explanations, the trial court must then decide whether the defendant has proved purposeful discrimination. (*Ibid*.)

The prosecutor's justification for a peremptory challenge need not rise to the level of a challenge for cause, and even a trivial reason or hunch, if genuine and neutral, will suffice. (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) When deciding whether the defendant has shown purposeful discrimination, the trial court must determine whether the prosecutor's reasons are sincere and legitimate, or whether they are "implausible or fantastic justifications" serving as pretexts for a discriminatory purpose. (*People v. Reynoso, supra*, 31 Cal.4th at pp. 916, 924.)

The trial court's findings on purposeful discrimination turn largely on credibility, and on appeal we review the court's ruling for substantial evidence. (*People v. Lenix, supra*, 44 Cal.4th at pp. 613-614.) "'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability

to distinguish bona fide reasons from sham excuses. . . . So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.'" (*Ibid*.)

During the first four peremptory challenges exercised by the prosecutor, the prosecutor excused three Hispanic jurors (C.V., J.C., and C.H.). Defense counsel then made a *Batson/Wheeler* motion, arguing the prosecutor was systematically excluding people of Hispanic heritage. The court found that defendant had made a prima facie showing of discrimination and asked the prosecutor to explain his reasons for dismissing the three Hispanic jurors. As we shall delineate below, the prosecutor set forth his reasons, and the court concluded defendant had not carried his burden to show purposeful discrimination. Preliminarily, the court noted that the first juror excused by the prosecutor was not Hispanic. Further, both the defendant and the victim were Hispanic; hence, this was not a case involving a defendant and victim of different races. The court then evaluated the reasons proffered by the prosecutor for the dismissal of the Hispanic jurors, and concluded they were legitimate, not pretextual.

We summarize the record and evaluate the court's findings with respect to each of these jurors in turn.

C.V.

During voir dire questioning by the prosecutor, the prosecutor asked if there were any jurors who did not want to be at the trial because it was going to be lengthy (lasting potentially three months) and it was a serious murder case. C.V. responded that he had a problem with the subject matter, explaining he was uncomfortable with the idea of death

and when he hears about a dead person he thinks about the family and friends and feels sad. The prosecutor acknowledged it was not easy to deal with, but asked if C.V. thought he could be fair in this case, if he could listen to the evidence, and depending on what the evidence showed could he return a guilty verdict. C.V. responded "Yes" to these questions. C.V. also answered "Yes" when the prosecutor asked jurors if they could "keep [their] emotions out and [their] common sense in."

Explaining why he excused C.V., the prosecutor stated that when he asked if any jurors did not want to be at the trial, C.V. indicated he did not want to be there and he did not think this would be the right case for him. The court found that this was a "classic example" of a peremptory challenge because an attorney does not want a juror who does not want to be there, especially for a lengthy trial.

The record supports the court's finding of no pretext for C.V. When the prosecutor asked the jurors if anyone did not want to be at the trial because of its length or subject matter, C.V. responded that he was uncomfortable with the subject matter of death because it made him sad. Although this response could suggest sympathy for the victim in a manner favorable to the prosecution, the prosecutor could also deduce that C.V. tended to be emotional and hence might have sympathy for a defendant who killed because of an emotional response to his wife's perceived infidelity.

Defendant asserts that an inference of pretext arises because the prosecutor misconstrued the record when stating that C.V. said he did not want to be there and the case was not the right one for him, and further the prosecutor did not question C.V. about whether he would be better suited to a different case. The contention is unavailing.

When the prosecutor asked if any jurors did not want to be at the trial because of its length or subject matter, C.V.'s response that he was uncomfortable with the subject matter implicitly conveyed that he was concerned about being at this trial and whether this was the right case for him. C.V.'s response also provided sufficient information for the prosecutor to evaluate his suitability as a juror without further questioning about whether he should serve at a different trial.

Defendant also argues the prosecutor's reason was pretextual because many jurors were uncomfortable with the homicide subject matter, and C.V. confirmed that he could be fair and could control his emotions. The fact that homicide may be an uncomfortable subject for many jurors does not establish that the prosecutor could not properly excuse a juror based on an assessment that the juror did not want to be there due to the difficult nature of the case. Further, the prosecutor was not required to accept C.V.'s ultimate statements that he could be fair and set aside his emotions; rather, the prosecutor was entitled to make his own determinations on these matters when exercising peremptory challenges.

Using a comparative analysis, defendant asserts the prosecutor's pretextual basis for excusing C.V. is shown by the fact that the prosecutor did not excuse a non-Hispanic juror (S.C.) who also stated she did not want to be at the trial.[5] An inference of pretext may be drawn if the prosecutor's proffered reason for excusing a juror applies equally to a similarly-situated juror who is not a member of the identified group and who was retained

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5 Defense counsel later excused S.C.

by the prosecutor. (See *People v. Lewis, supra,* 43 Cal.4th at p. 472; *People v. Lenix, supra,* 44 Cal.4th at pp. 621-622.) The record does not show that S.C. was similarly situated to C.V. During voir dire questioning by the prosecutor, S.C. stated she did not want to be at the trial because its length would affect her workload at the office given that she had no backup and would have to catch up on a lot of things; however, upon further questioning she stated this would not impact her ability to be fair. A concern about a lengthy trial affecting workload is markedly different from a concern about an emotional response to the subject matter of the trial, and the workload concern does not raise the issue of sympathy in favor of one party. The prosecutor's failure to dismiss S.C. does not show pretext with respect to C.V.

J.C.

During preliminary voir dire questioning, J.C. stated he had two cousins who worked in law enforcement; he had attended police academy; and his daughter had been a rape victim and the perpetrator had pleaded guilty and was in jail. During questioning by defense counsel, J.C. stated he had attended police academy 16 years ago for a few weeks and then left because his girlfriend became pregnant. When the prosecutor asked the jurors if any of them had concerns about the subject matter of the case, J.C. stated he did not know if he would be able to set aside and "not bring . . . home" what he saw throughout the case. On further questioning, J.C. stated he thought he could be fair. When the prosecutor asked jurors whether they knew anyone who had gone through a divorce, J.C. stated his cousin had undergone a long divorce. When the prosecutor asked

him whether a "nasty" divorce can justify harming the other spouse, J.C. responded, "No."

Explaining why he excused J.C., the prosecutor commented that J.C. could be a favorable juror for the prosecution due to the fact that he had two cousins in law enforcement. However, the prosecutor noted that J.C.'s daughter had been raped and he had left the police academy after two weeks. Based on this, the prosecutor stated he was not sure what J.C.'s feelings were towards law enforcement. The prosecutor elaborated that he did not want to question J.C. about the details of the rape case because it was a sensitive topic especially for a parent; he did not think a parent who had gone through a rape case should have to sit through this type of homicide case; and a father might have a long-lasting rage response to his child's rape that could make him amenable to a voluntary manslaughter verdict in this case due to the defendant's rage. Further, the prosecutor was suspicious about J.C.'s statement that he left the police academy after two weeks because his girlfriend got pregnant, and the prosecutor did not know if he left on "good terms or bad terms."

Defense counsel asserted that J.C.'s background showed he would be favorable to the prosecution, including being the father of a rape victim who would have an opportunity in this case to get justice against a defendant.

The court assessed that J.C.'s status as the father of a rape victim could be looked at in two different ways; i.e., the father could be angry at criminals, or the father could see a justification for a harmed, enraged person (such as a betrayed spouse) taking matters " 'into [his or her] own hands.' " Accordingly, the court credited the prosecutor's

explanation that he excused J.C. due to the possibility that he had experienced "an enormous amount of rage" concerning a sexual incident with a family member that might cause him to mitigate the offense down to voluntary manslaughter.

The trial court reasonably credited the prosecutor's race-neutral explanation for dismissing J.C. Although there were factors in J.C.'s background that could have made him a juror desired by the prosecution, the prosecutor could legitimately excuse him based on a determination that he might have a personal understanding of the anger felt by defendant due to his wife's perceived infidelity, and hence more likely to consider returning a verdict more favorable to the defense.[6] Even though J.C. stated he did not think a situation such as a difficult divorce could justify inflicting physical harm on a spouse, the prosecutor could nevertheless legitimately view J.C. as a juror who might have empathy for someone who commits a crime while experiencing a rage reaction.

To support his claim of pretext, defendant points to the fact that the prosecutor did not question J.C. about whether he felt rage about his daughter's rape. A finding of pretext can be based on the prosecutor's failure to engage a juror in meaningful voir dire about the topic the prosecutor has identified as important. (See *People v. Lewis, supra,* 43 Cal.4th at p. 476.) The trial court could reasonably credit the prosecutor's statement that he did not want to subject J.C. to detailed questioning about an obviously highly painful experience. Further, the prosecutor could deduce that it would not be unusual for

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[6] After the presentation of evidence at trial, the court ruled the evidence did not warrant instructions on voluntary manslaughter as a lesser offense of murder. This development does not undermine the propriety of the prosecutor's consideration of voluntary manslaughter as a possible verdict during the voir dire stage of the case.

a father whose daughter was raped to experience rage at some point, and thus there was no need to question J.C. on this matter. The record does not show an absence of meaningful voir dire.

Defendant also contends that pretext is shown because the prosecutor did not excuse a juror (Juror. No. 222) whose foster daughter had been molested. The record does not indicate whether Juror No. 222 was non-Hispanic. In any event, even assuming that she was not Hispanic, the record does not show Juror No. 222 was similarly-situated to J.C. When asked by the prosecutor whether she had any training or experience dealing with sanity issues or the developmentally disabled, Juror No. 222 stated that she has had close to 22 foster children, about three of them were bipolar, and they had issues with rage and anger. A female foster child had been molested at age five and assaulted with cattle prods; the child regressed, became violent, and had to be hospitalized; the social workers who placed the child with the juror did not know about her background; and it was "a learning experience" and the child did not return to the juror's home. The prosecutor could reasonably believe that Juror No. 222's experience with a victimized foster child who temporarily stayed in her home would not generate the same type of emotional rage response as J.C.'s experience with his daughter's rape. Further, Juror No. 222 stated that she had no problems sitting on a murder case, whereas J.C. stated he was concerned about not being able to set aside what he heard during the case. Given the qualitative differences in their relationships with a sexual assault victim and in their responses concerning the subject matter of the trial, these jurors were not similarly

situated. Accordingly, the prosecutor's failure to excuse Juror No. 222 does not reflect a pretext as to J.C.

C.H.

The victim and defendant in this case were both from Oaxaca, Mexico; accordingly, during voir dire questioning defense counsel asked the jurors about their contacts with people from Oaxaca. In response to this query, C.H. stated that she had been to Mexico, and although she had not been to Oaxaca she had "most likely" met someone from Oaxaca because she met "a lot of people everyday." During voir dire questioning by the prosecutor, the prosecutor asked the jurors if everyone needed to follow the "laws of the land," or was it acceptable for different rules to apply to immigrants due to cultural differences. C.H. responded: "[I]f we're equal people, we should be treated the same way, no matter if you were born here or immigrated." When she made this response, the interpreter stated he could not hear her, and the prosecutor instructed C.H. to speak up. C.H. repeated her answer, and the prosecutor continued inquiring about this topic with other jurors.

The prosecutor stated that he excused C.H. because when he collectively asked the jurors whether all people should be treated equally rather than considering cultural issues, "at first [C.H.] was nodding her head." However, when he asked C.H. about this she hesitated, which indicated to him that there may be "some issues with it." Defense counsel argued that he did not recall any hesitation from C.H., and C.H. said "she was not influenced by culture in any way."

The court commented that its decision concerning C.H. was more difficult and "a bit of a close one." The court stated that it "personally could not say with certitude" whether C.H. hesitated when queried about the cultural issues, and this was not a matter that could be confirmed by having the court reporter check the record of her voir dire answer. However, the court concluded the prosecutor's explanation was credible.

Defendant asserts the record shows C.H. responded in unequivocal fashion that people should be treated equally when asked if different rules could apply to immigrants. Further, he notes the prosecutor did not question C.H. about any hesitation even though he had questioned others jurors about their hesitation.

As the trial court observed, a juror's hesitation is not something that would necessarily be captured in the reporter's transcript. A perception of hesitation can arise from subtle demeanor factors observed by the prosecutor. In this arena, we are required to accept the trial court's assessment of the prosecutor's credibility as long as the record shows the trial court conscientiously considered the matter. The record reflects the court carefully considered whether the prosecutor was providing a pretextual reason for excusing C.H., and the court concluded his explanation was sincere. Because the trial court was in a position to observe the prosecutor's demeanor, we defer to this credibility determination. (See *People v. Lenix, supra*, 44 Cal.4th at pp. 613-614; see also *Thaler v. Haynes* (2010) __ U.S.__ [130 S.Ct. 1171, 1175] [trial judge can properly credit prosecutor's demeanor-based explanation for peremptory challenge even if judge did not personally observe or recall juror's demeanor].)

Further, the record shows the prosecutor engaged in extensive juror questioning about whether they would hold immigrants accountable under our laws and not allow for any leniency due to cultural differences. This extensive questioning supports that any hesitation by C.H. in responding to this question would be a matter of significance to the prosecutor. The fact that the prosecutor asked other jurors, but not C.H., about their hesitation does not alone establish that the prosecutor did not observe this reaction in C.H. The prosecutor may have concluded there was no need for further inquiry of C.H. because he was satisfied based on her hesitation that, even if she stated that all people should be treated equally, she might be sensitive to potentially different cultural mores and could be a juror more favorable to the defense than to the prosecution. Regardless of the objective reasonableness of relying on C.H.'s perceived hesitation, the trial court was entitled to find it legitimate based on an assessment that the prosecutor genuinely relied on this race-neutral reason for a peremptory challenge. (See *People v. Reynoso, supra,* 31 Cal.4th at p. 924 ["The proper focus . . . is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons."].)

Additionally, as found by the trial court, the record generally supports an inference of no purposeful discrimination because both the victim and the defendant were Hispanic. Thus, this is not a case where the removal of Hispanics could operate to the prosecution's benefit by reducing the number of jurors who share the defendant's, but not the victim's, ethnicity. (See *People v. Reynoso, supra,* 31 Cal.4th at p. 926, fn. 7 [fact that both defendants and murder victims were Hispanic can be "viewed as neutralizing any

suspected untoward belief" by prosecutor that Hispanic jurors would tend to be biased in favor of Hispanic defendants].)

The record supports the court's finding of no purposeful discrimination.

II. *Prosecutorial Misconduct*

Defendant argues the prosecutor engaged in misconduct during closing argument by (1) misstating the mental state for second degree murder, and (2) commenting on defendant's decision not to testify. Because defense counsel did not object to these closing arguments at trial, defendant contends he was provided ineffective assistance of counsel.

To preserve the issue for appellate review, a defendant must object to prosecutorial misconduct and request that the jury be admonished unless these actions would be futile or ineffective in curing the harm. (*People v. Harrison* (2005) 35 Cal.4th 208, 243-244.) As defendant recognizes, his counsel did not object to the instances of misconduct now raised on appeal. However, we need not discuss the issues of forfeiture or ineffective representation because, even addressing the misconduct claims on their merits, there is no basis for reversal. (See *id*. at p. 244.)

A. *Prosecutor's Arguments About Mental State for Second Degree Murder*

Defendant argues that during closing arguments the prosecutor told the jury that a finding of intent to kill precluded a conviction of second degree murder. To review this contention, we summarize the general law governing first and second degree murder, the court's instructions to the jury, and the prosecutor's statements during closing argument.

1. *General Law*

Murder is an unlawful killing committed with malice aforethought. (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) Malice may be express or implied; it is express when the defendant intends to kill, and it is implied when the defendant deliberately commits an act that is dangerous to human life and acts with knowledge of the danger and a conscious disregard for life. (*Ibid*.)

For first degree premeditated murder, the malice must be express; i.e., with intent to kill. (*People v. Moon* (2005) 37 Cal.4th 1, 29.) Further, the intentional killing must have occurred with deliberation and premeditation. (*People v. Hart* (1999) 20 Cal.4th 546, 608.) Deliberation refers to a careful weighing of considerations in forming a course of action; premeditation means thought over in advance. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) Premeditation and deliberation require more than mere formation of intent to kill. (*Ibid.*; *People v. Concha* (2010) 182 Cal.App.4th 1072, 1083-1084.) That is, the evidence must show that the intent to kill arose from preexisting thought and reflection rather than an unconsidered or rash impulse. (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)

Second degree murder is an unlawful killing with either express or implied malice, but without the premeditation and deliberation that elevates the offense to first degree murder. (*People v. Prince* (2007) 40 Cal.4th 1179, 1265-1266; *People v. Bohana* (2000) 84 Cal.App.4th 360, 368.)

2. *Jury Instructions*

Based on these principles, the trial court instructed the jury that the defendant was charged in count 1 with murder, and to prove this charge the prosecution had to prove that he acted with malice aforethought. The court explained that malice could be either express or implied; malice is express if he intended to kill; malice is implied if he intentionally committed an act dangerous to human life with knowledge of the danger and conscious disregard for life; and malice must be formed before the act but did not require deliberation. (See CALCRIM No. 520.)

The court then told the jury that if it decided defendant had committed murder, it must then decide whether it was murder of the first or second degree. The court stated that defendant was guilty of first degree murder if the prosecution proved he acted "willfully, deliberately, and with premeditation." The court defined these terms, stating that defendant acted willfully if he intended to kill; he acted deliberately if he carefully weighed the considerations for and against his choice and knowing the consequences decided to kill; and he acted with premeditation if he decided to kill before committing the act. After defining first degree murder, the court stated that all other murders are of the second degree. (See CALCRIM No. 521.)

3. *Prosecutor's Closing Arguments*

In closing arguments, the prosecutor told the jury that it had to decide if the killing was committed with malice aforethought, which could be either express or implied. Further, the jury had to decide between first degree murder, second degree murder, and

not guilty. The prosecutor told the jury it should immediately reject a not guilty verdict, and its responsibility was to decide if the offense was first or second degree murder.

Addressing the malice requirement, the prosecutor argued the evidence showed defendant acted with express malice based on an intent to kill because he shot the victim multiple times. The prosecutor also defined implied malice as the intentional commission of an act dangerous to life with knowledge and conscious disregard of the danger to life; gave an example of implied malice (i.e., firing a couple of rounds at a group of people without the intent to kill them but knowing the act was dangerous and with conscious disregard); and then argued the jury did not "have to worry" about implied malice because the evidence showed express malice.

After providing this explanation of malice for murder, the prosecutor addressed first degree murder, stating: "This is how we get to first degree murder. Did he intend to kill someone? Did he kill another human being with malice aforethought, and was it willful, premeditated and deliberate?" The prosecutor then delineated the three elements of first degree murder defined in the court's instructions (willful, deliberate, and premeditated), quoted the court's definition of each of the elements, and argued the evidence supported each of these elements.

The prosecutor stated the defendant acted willfully if he intended to kill, which was shown by the fact that he pointed the gun and shot multiple times, including one shot believed to be execution style. The defendant acted deliberately if he weighed the considerations for and against his choice and knew the consequences, which was shown by his admission that he bought the gun several days earlier and brought it with him on

the day of the shooting in case he saw the victim. The defendant premeditated if he decided to kill before committing the act, which was also shown by his admission that he bought the gun in case he saw the victim. The prosecutor commented premeditation and deliberation did not "need that much time," and it was not the length that was important but the careful consideration of what the defendant was going to do and making that choice. The prosecutor also pointed to defendant's motive for the crime, his flight after the crime, and his confession, and argued the evidence showed "[a]ll the elements needed for first degree murder."

Summing up its argument, the prosecutor stated:

> "Possible verdicts. You'll get these verdict forms, and if you believe that he premeditated, willfully deliberated this murder, you sign 1(a) . . . . *If you believe he didn't mean to kill him, but he knew he was firing a firearm, it's second degree murder*. . . . That's 2(a). And if you think he's not guilty of either of the crimes, you fill out 1(b) and 2(b). . . . But in this case all you have to decide is it murder in the first degree, or is it murder in the second degree? [¶] . . . [¶] . . . I'm asking you to come back with first degree murder, premeditation, willfully, and deliberate . . . ." (Italics added.)

Thereafter, during defense closing arguments, defense counsel conceded that defendant committed second degree murder. However, defense counsel asserted the evidence did not show premeditation and deliberation for first degree murder because it made no sense that defendant would plan to kill the victim at a large gathering of people who knew defendant.

In rebuttal, the prosecutor argued:

> "We agree with [defendant]. It's murder. But it's for you to decide is it second or first, and *what evidence do we have that this is a second degree murder, that he didn't intend to kill this person, he didn't plan it*? He bought a gun." (Italics added.)

4. *Analysis*

As set forth above, a defendant may be found guilty of second degree murder even if the defendant intended to kill the victim, but there was no premeditation and deliberation. Defendant argues that the prosecutor misled the jury about this principle by effectively stating that intent to kill precluded a second degree murder verdict. In support, defendant cites the prosecutor's statement that "[i]f you believe he didn't mean to kill him, but he knew he was firing a firearm, it's second degree murder[,]" and then later, "what evidence do we have that this is a second degree murder, that he didn't intend to kill this person, he didn't plan it?"

When evaluating claims of improper argument to the jury, " 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Harrison*, *supra*, 35 Cal.4th at p. 244.) When the prosecutor's statements are read in context, there is no reasonable likelihood the jury interpreted them to mean that if it found defendant had the intent to kill, he had to be convicted of first degree, not second degree, murder.

The court instructed the jury that first degree murder required willful conduct (defined as intent to kill), premeditation, and deliberation. The prosecutor tracked these elements when arguing for first degree murder, stating that defendant acted willfully because he intended to kill when he pointed and shot multiple times, and he acted with deliberation and premeditation because he told the police that he acquired the gun several days earlier and brought the gun with him in case he encountered the victim. Further,

defense counsel argued to the jury that the offense was second, not first, degree murder because defendant did not plan the killing. Based on these instructions and arguments, there is no possibility that the jury thought it could find first degree murder based *solely* on intent to kill; rather, the jury knew it also had to find premeditation and deliberation. Under these instructions and argument, if the jury found no premeditation and deliberation but found intent to kill, the only verdict available to them was second degree murder.

The court's instructions also told the jury that malice could be based on either intent to kill (express malice) or conscious disregard for life (implied malice). The prosecutor reiterated the two definitions of malice in his closing argument, and gave an example of implied malice when a person shoots into a crowd without intent to kill. Thus, when during the summation of his argument the prosecutor stated that defendant committed second degree murder if he did not intend to kill but knew he was firing a firearm, this was an obvious reference to implied malice. Although the prosecutor *omitted* second degree murder based on express malice/intent to kill from this summation portion of his argument, there is no reasonable likelihood the jury interpreted this omission to mean intent to kill required a first degree murder verdict. It is clear from the instructions and the arguments that the jury knew that first degree murder required premeditation and deliberation, not just intent to kill. Additionally, during an early portion of the prosecutor's closing argument, the prosecutor expressly referred to second degree murder based on express malice/intent to kill, stating, "If there was malice

aforethought, there [are] two kinds, expressed and implied, *and if he intentionally killed that other person, it's second degree murder*." (Italics added.)

Similarly, the prosecutor did not misstate the law when arguing in rebuttal that defendant did not commit second degree murder because there was no evidence that he did not intend to kill and no evidence he did not plan the killing. Again, the prosecutor was referencing the elements of first degree murder (intent to kill and premeditation/deliberation) and arguing that the evidence established these elements. The prosecutor's statement did not suggest that intent to kill was sufficient for a first degree murder verdict or that the presence of intent to kill precluded second degree murder.

Because the jury was clearly apprised from both the court's instructions and the closing arguments that first degree murder required premeditation and deliberation, the jury necessarily would have returned a second degree murder verdict if it found intent to kill but no premeditation and deliberation. The prosecutor's later references to second degree murder based on implied malice (i.e., knowingly firing the gun with no intent to kill), and to the evidentiary support for first degree murder (i.e., intent to kill and planning), did not misstate the law.

B. *Prosecutor's Reference to Defendant's Decision Not To Testify*

During closing arguments, the prosecutor delineated the statements made by defendant to the police in which he admitted that he shot the victim at the party and he requested that the police "punish" him. After setting forth the defendant's statements, the prosecutor stated to the jury: "He admits. He says, 'Punish me. I don't want to get

anyone involved,' and *yet he doesn't take the stand for obvious reasons*, but he wants to take responsibility, and the people who have to make him responsible are all of you." (Italics added.)

To protect the constitutional privilege against self-incrimination, the prosecutor is prohibited from commenting on the defendant's failure to testify at trial. (*People v. Clair* (1992) 2 Cal.4th 629, 662.) The rationale for this rule is that the jury should not be invited to "consider the defendant's silence as evidence of guilt." (*People v. Lewis* (2001) 25 Cal.4th 610, 670.) We agree with defendant that the prosecutor committed misconduct by referencing his decision not to testify.

However, we conclude the error was harmless beyond a reasonable doubt. (*People v. Turner* (2004) 34 Cal.4th 406, 420.) The prosecutor's comment was brief and made in passing. Further, defendant did not dispute that he committed second degree murder but defended on the basis that he did not commit first degree murder. The prosecutor's improper reference to defendant's failure to take the stand was made in the context of arguing that defendant admitted to the police that he was guilty. However, the comment was not tied to the prosecutor's contention that defendant was guilty of first, not merely second, degree murder because he premeditated the killing. Thus, the error had no direct impact on the key disputed issue regarding the degree of the murder. Additionally, the jury was instructed that a defendant has a constitutional right not to testify, and it should not consider, discuss, or be influenced by the fact that the defendant did not testify. (See CALCRIM No. 355.) We presume the jury followed the court's instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217.)

There is no reasonable possibility the prosecutor's brief comment affected the jury's verdict.

III. *Substantial Evidence of Premeditation and Deliberation*

Defendant argues the record does not support the jury's finding that he engaged in premeditation and deliberation.

In evaluating a challenge to the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) We presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*Ibid*.) If the circumstances reasonably justify the jury's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*Ibid*.)

Deliberation and premeditation require an intentional killing that is the result of preexisting thought and a careful weighing of considerations rather than unconsidered or rash impulse. (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 419; *People v. Stitely*, *supra*, 35 Cal.4th at p. 543.) However, deliberation and premeditation do not require an extended period of time, merely an opportunity for reflection. (*People v. Cook* (2006) 39 Cal.4th 566, 603.) The "true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly [distinguishing] those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed." (*People v. Thomas* (1945)

25 Cal.2d 880, 900-901.) Factors such as planning, motive, and manner of killing can assist in the determination of premeditation and deliberation, but they are not required or exhaustive. (*People v. Halvorsen, supra*, 42 Cal.4th at pp. 419-421; *People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

To support his challenge to the jury's verdict, defendant contends that the killing reflected a sudden explosion of violence rather than a cold, calculated judgment because within seconds of seeing Barrita at the party, he "snapped" and shot him in a public location in front of numerous bystanders. The jury was not required to reach this conclusion. Defendant told the police he was angry and felt disrespected by Barrita because of Barrita's conduct concerning defendant's wife; he bought the gun several days before the shooting and thought about looking for Barrita; and he brought the gun with him to the party in case he encountered Barrita. This showed defendant engaged in substantial planning activity prior to the shooting. Further, the jury could find that defendant's conduct of continuing to shoot after the victim had already fallen to the ground reflected a predetermined plan to inflict sufficient wounds to ensure the victim's death rather than an impulsive, unconsidered shooting. Contrary to defendant's contention, the jury was not required to find the public location of the shooting established a lack of planning.

The record supports the jury's findings of premeditation and deliberation.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

MCDONALD, J.